IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ALICIA L.,	)	
	)	2 CA-JV 2006-0051
Appellant,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ARIZONA DEPARTMENT OF	)	Rule 28, Rules of Civil
ECONOMIC SECURITY, HENRY L.,	)	Appellate Procedure
LEVI L., JACKIE L., and DESTINY L.,	)	
	)	
Appellees.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 16559400

Honorable Michael O. Miller, Judge

AFFIRMED

Jeanne Shirly
Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By William V. Hornung
Tucson
Attorneys for Appellee Arizona
Department of Economic Security

E C K E R S T R O M, Presiding Judge.

¶1 Alicia L. appeals from the juvenile court's September 2006 order, entered after a four-day jury trial, terminating her parental rights to her four children, who are: Henry, born in July 1998; Levi, born in July 2001; Jackie, born in September 2002; and Destiny L., born in August 2003. The jury found by clear and convincing evidence that severance of Alicia's parental rights was warranted on grounds of mental illness or mental deficiency, *see* A.R.S. § 8-533(B)(3), and the fact that the children had spent fifteen months or longer in court-ordered, out-of-home placement, *see* § 8-533(B)(8)(b). The jury also found that termination of Alicia's parental rights was in the best interests of each child.

¶2 Alicia maintains the juvenile court abused its discretion in allowing caseworkers employed by the Child Protective Services (CPS) division of the Arizona Department of Economic Security (ADES) to testify about statements made by out-of-court declarants. In addition, Alicia argues the jury's determination that severance was in the best interests of the children was unsupported by substantial evidence.

Hearsay

¶3 "We will not disturb a trial court's ruling on the admissibility of evidence absent a clear abuse of discretion and resulting prejudice." *Jimenez v. Wal-Mart Stores, Inc.*, 206 Ariz. 424, ¶ 10, 79 P.3d 673, 676 (App. 2003). We find no basis for reversing the verdict and judgment here.

¶4 At trial, Alicia objected to the testimony, which we summarize below, contending it was inadmissible hearsay under Rule 802, Ariz. R. Evid., 17A A.R.S.

- Testimony by CPS investigator Heather Beckwith that she had been told Alicia stopped receiving services from a parenting assistance organization because Alicia had failed to attend appointments and that this was "part of [the] reason"—in addition to health and safety issues—that Beckwith initially removed the children from the home in July 2003;[1]

- Testimony by CPS investigator Heather Jackson that in March 2005, after Jackie and Destiny had been returned to Alicia's care, Destiny was hospitalized and diagnosed as suffering from "failure to thrive," and that this diagnosis caused Jackson to recommend that Destiny not be returned to Alicia's care;

- Testimony by CPS case manager Elaine Whitmanbonner that her decision to remove Destiny and Jackie from Alicia's care in April 2005 was based on statements by hospital social workers that Destiny was suffering from a "failure to thrive," on a therapist's observation that Jackie seemed to have "no joy," and on reports from other service providers that Alicia had missed scheduled therapy appointments and had failed to provide food or toys for the children; and

- Testimony by CPS case manager Doug DeCiancio that a service agency's discharge summary indicated that Alicia had failed to complete treatment for anger management.

¶5 The juvenile court overruled Alicia's hearsay objections. After one of those objections, however, the court instructed the jury at Alicia's request that "[t]he jury is not

[1]Destiny was subsequently removed from Alicia's care after her birth in August 2003.

to accept the third party statement as a truthful statement, only as a basis for the witness's opinion." The court denied Alicia's request to repeat this instruction after each hearsay objection but, at the close of the evidence, gave the following jury instruction:

> Hearsay. At various points in this trial, psychologists, counselors, therapists and CPS case managers testified about written or oral statements made by persons who were not a party to this case. The statements were considered or used by these testifying professionals in the course of their work. Out-of-court statements by nonparties are hearsay, and you should not consider the statements to be true for the truth of the matter asserted in the statements. Rather, you should only consider the statements in judging the credibility of the testifying witnesses, and any opinions that they may have offered.

According to Alicia, despite these instructions, "[t]he she[e]r volume of hearsay admitted amounts to abuse of discretion and resulted in prejudice."

¶6 The trial court did not abuse its discretion in admitting the statements made by Beckwith, Jackson, and Whitmanbonner. In each of these instances, the CPS employees were asked to explain the reasons for their actions and responded by relating information that had influenced their decisions. These statements were not hearsay because they were not admitted for the truth of the matter asserted. *See Pub. Serv. Co. of Okla. v. Bleak*, 134 Ariz. 311, 320, 656 P.2d 600, 609 (1982) (statements offered for their effect on listener "are not within the proscription of Ariz. R. Evid. 802, since they are not offered for a hearsay purpose"). As explained in *Bleak*, such statements are "'relevant to prove the motive or the reasonableness of conduct of the person receiving the communication'" and are admissible for that purpose. *Id.* at 321, 656 P.2d at 610, *quoting* 1 Morris K. Udall & Joseph M.

Livermore, *Arizona Law of Evidence* § 122 at 238 (2d ed. 1982). The juvenile court fully instructed the jury on this point, and we presume the jurors followed that limiting instruction during their deliberations. *See State v. Prince*, 204 Ariz. 156, ¶ 9, 61 P.3d 450, 452 (2003).

¶7 On the other hand, the juvenile court should have sustained Alicia's objection to DeCiancio's testimony about a service agency's discharge summary that was not in evidence. Unlike Beckwith, Jackson, and Whitmanbonner, DeCiancio was not responding to a question about his own conduct or motivation. Alicia's counsel had asked DeCiancio if Alicia had completed counseling with the service agency as required by her case plan, and DeCiancio responded: "[A]ll I can say is, at some point, [the agency] disengaged with her. . . . I don't remember having received any documentation that she had completed counseling, or any status of the services she was involved in at [the agency]." On re-direct examination, counsel for ADES showed DeCiancio the agency's discharge summary, which was not in evidence. Rather than ask DiCiancio if he had seen the report before, or whether it refreshed his recollection about documentation he had received from the agency, counsel for ADES merely asked him to testify about its content. In that form, the question and response were objectionable.

¶8 We cannot conclude, however, that admission of this testimony was prejudicial, reversible error. Alicia has not explained how this statement might have prejudiced her substantial rights. *See Gutierrez v. Gutierrez*, 20 Ariz. App. 388, 389, 513 P.2d 677, 678 (1973) (burden on appellant to establish substantial prejudice). And Alicia

herself testified she had not completed anger management counseling at the agency DeCiancio identified, adding she had continued these sessions with another provider. When hearsay is merely cumulative to other properly admitted evidence and reflects facts that are undisputed, its admission is not prejudicial. *Bleak*, 134 Ariz. at 321-22, 656 P.2d at 610-11. Accordingly, we find no basis for reversal in the juvenile court's evidentiary rulings.

Best Interests

¶9 We view the evidence in the light most favorable to upholding the jury's verdict and, without re-weighing the evidence, "look only to determine whether there was substantial evidence" to support that verdict. *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 927-28 (App. 2005). "Substantial evidence" is evidence "reasonable persons could accept as sufficient" under the applicable standard of proof to support their conclusion. *Cf. State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997) (criminal case).

¶10 Alicia maintains the jury erred when it found that termination of her parental rights was in the best interests of her children and that such findings are not supported by substantial evidence. She asserts there is "no guarantee" that Destiny and Jackie will be adopted by their current foster family or that adoptive placements will be found for Henry and Levi. We find substantial evidence in the record to support the jury's verdict.

¶11 To conclude that termination of Alicia's parental rights was in the best interests of her children, as required by A.R.S. § 8-533(B), the trier of fact must find by a

preponderance of the evidence that the children would "benefit from termination of the relationship or . . . be harmed by continuation of the relationship." *James S. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 351, ¶ 18, 972 P.2d 684, 689 (App. 1998); *see also Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 42, 110 P.3d 1013, 1022 (2005) (best interests need only be proved by preponderance of evidence). A child's opportunity for adoptive placement weighs in favor of severance. *See, e.g.*, *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 19, 83 P.3d 43, 50 (App. 2004) ("The best interest requirement may be met if, for example, the petitioner proves that a current adoptive plan exists for the child . . . ."). But even without a firm plan of adoption, severance benefits adoptable children by freeing them for adoption. *See In re Maricopa County Juvenile Action No. JS-501904*, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994).

¶12 In this case, CPS case manager Layli Milden testified that CPS was still seeking an adoptive placement for Henry but had placed Levi with foster parents who were considering adopting him and had placed Jackie and Destiny together with foster parents who were strongly considering adopting them. In Milden's opinion, all four of the children were adoptable, even in light of their special needs, and termination of Alicia's parental rights was in each of their best interests.

¶13 In addition to the benefit of the children's being freed for adoption, there was also substantial evidence in the record that severance would protect the children from harm caused by a continuation of Alicia's role as their parent. Dr. Michael German, a licensed

psychologist, testified about a family psychological evaluation he had conducted in December 2005. German opined that Alicia was presently unable to safely parent her children due to her cognitive limitations, her emotional impairments, and the lack of a strong support system to provide structure and impose accountability. And, he concluded Alicia's inability to parent would continue for a prolonged, indeterminate period of time. This assessment was consistent with the testimony of Dee Winsky and Daniel Overbeck, both licensed psychologists who had evaluated Alicia in 2003. Winsky had characterized Alicia as having cognitive limitations that were enduring and not easily treatable. Overbeck met with Alicia, Henry, Levi, Jackie, and Destiny for a bonding and attachment evaluation that involved over seventeen hours of observation. Although he commented on Alicia's strong desire to be a good parent, he opined that as a result of her cognitive limitations and "emotional situation in terms of personality," her children likely suffered from an "insecure attachment" to Alicia, placing them at risk for behavior and relationship problems as they grow older. Like German and Winsky, he concluded that Alicia's difficulties did not "tend to be very amenable to change over time" and so had reasonable grounds to believe that her condition would continue for a prolonged, indeterminate period. This substantial evidence supported the jury's determination that severance of Alicia's parental rights was in the best interests of her children, based on both affirmative benefits and avoidance of future harm.

Conclusion

¶14 As addressed above, the statements Alicia has challenged as inadmissible hearsay were either admissible or their admission did not constitute prejudicial, reversible error. In addition, the jury's determination that severance of Alicia's parental rights is in the best interests of her children was supported by substantial evidence. Accordingly, we affirm the juvenile court's judgment terminating Alicia's parental rights to Henry, Levi, Jackie, and Destiny.

_____

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

_____

J. WILLIAM BRAMMER, JR., Judge

_____

PHILIP G. ESPINOSA, Judge